

PRIVY COUNCIL APPEAL

**T.O. THOMAS v.
ASIA FISHING INDUSTRY (PTE) LTD.**

[Federal Court Civil Appeal No. 39 of 1976]

The appellant's petition for special leave to appeal to His Majesty the Yang di-Pertuan Agong in the above matter ([1977] 1 M.L.J. 151) was dismissed with costs by the Privy Council on February 16, 1978.

Petition dismissed.

PRIVY COUNCIL REPORT

CHOW YEE WAH & ANOR. v. CHOO AH PAT

[Privy Council (Lord Diplock, Lord Simon of Glaisdale, Lord Fraser of Tullybelton, Lord Scarman, and Sir John Pennycuik) May 3, 1978]

[Privy Council Civil Appeal No. 43 of 1975]

Trust — Personal property — Joint account by deceased in name of himself and first appellant for benefit of common law wife — Whether deceased was of sound mind at time cheque drawn up.

Practice and procedure — Appeal — Principles on which appellate court should act in reviewing finding of fact.

In this case the deceased had prior to his death drawn a cheque for \$60,384.80 and paid it into a joint account which he opened in his name and the name of the first defendant for the benefit of his common law wife. The questions that arose for consideration were (1) whether or not the deceased was in full possession of his mental faculties when his thumbprints were affixed to the said cheque and documents; and (2) whether the presumption of a resulting trust was rebutted as there was a valid trust in this case. The learned trial judge, Abdul Hamid J. decided both questions in the affirmative and dismissed the respondent's claim to recover the money as administratrix of the estate of the deceased ([1974] 1 M.L.J. 62).

On appeal ([1975] 1 M.L.J. 245), the Federal Court in allowing the appeal held (1) the facts in the case showed that the deceased was not in full possession of his mental faculties when his thumbprints were affixed to the cheque and other documents; (2) in view of the uncertainty of the deceased's intention in this case there was no evidence of an express trust to rebut the resulting trust which arose. The appellants appealed to the Yang Di-Pertuan Agung. Two main issues were raised on the appeal. The first was whether the money was validly transferred by the deceased into the joint account or whether the cheque purporting to make the transfer was invalid on one of the several grounds alleged by the respondent. This was a question of fact which depended on the mental capacity of the deceased at the material time. The second question was whether, if such transfer was validly made, an effective trust was set up relating to the amount transferred. This was a question of law.

Held, allowing the appeal: (1) in the face of the finding by the trial judge on the question of fact the Federal Court were only entitled to displace his conclusion if they were satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion. In this case the reasons stated in the judgment of the Federal Court for disbelieving the defence witnesses fell short of what was required to entitle that court to reverse the decision of the trial judge who accepted them as truthful. The first question must therefore be answered as the trial judge answered it in favour of the appellants;

(2) the evidence in this case disclosed an intention on the part of the deceased, which was sufficiently clear and precise to impress the money with a trust for the benefit of his common law wife. The decision of the deceased was rational in itself and in the manner in which it was made and there was no reason to doubt that a valid trust was duly constituted by the deceased during his lifetime.

Cases referred to:-

(1) *Watt or Thomas v. Thomas* [1947] A.C. 487 at p. 487.

- A (2) *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd.* [1964] M.L.J. 87, 92.
(3) *Powell and wife v. Streatham Menor Nursing Home* [1935] A.C. 243, 249.
(4) *Clarke v. Edinburgh Tramways Co.* 1919 S.C. (H.L.) 35, 36.
(5) *Russell v. Scott* (1936) 55 C.L.R. 440, 449.
(6) *Standing v. Bowring* (1885) 31 Ch. D. 282, 287.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

- B *Mervyn Heald Q.C.* (George Newman with him) for the appellants.

R.R. Chelliah (Joginder Singh and G. Sri Ram with him) for the respondent.

Lord Fraser of Tullybelton (delivering the judgment of the Board): This is an appeal from the Federal Court of Malaysia which allowed an appeal from the judgment of the High Court in Malaya (Abdul Hamid J.). It concerns a dispute as to who is entitled to a sum of \$60,384.80. According to the appellants, the money was put in trust by a dying man as a provision for his widow and has been properly paid over to her; according to the respondent, it was obtained fraudulently from an unmarried man, when he was mentally incapable of understanding what he was doing, and ought now to be restored to his estate. Two main issues are raised. The first is whether the money was validly transferred by the late Loke Yaik Hoe ("the deceased") into a joint account in names of himself and the first appellant at the Pasar Road branch of the second appellants' bank, or whether the cheque purporting to make the transfer was invalid on one of the several grounds alleged by the respondent. This is a question of fact, the answer to which depends on the mental capacity of the deceased at the material time. The second question is whether, if such transfer was validly made, an effective trust was set up relating to the amount transferred. This is a question of law. Both questions were answered by Abdul Hamid J. in favour of the appellants, but his decision on both points was reversed by the Federal Court.

The trial judge's decision on the first question, the question of fact, was reached after he had heard a considerable volume of evidence, some of it sharply conflicting, and had accepted the appellants' evidence, and rejected the respondent's. The principles on which an appellate court should act in reviewing the decision of a judge of first instance on a question of fact have been stated in many cases in the House of Lords and in this Committee, and it will be appropriate to quote from two of them. In *Watt or Thomas v. Thomas*⁽¹⁾ Lord Thankerton said this:—

- H. "(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
I (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
(3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

That passage was quoted with approval in the judg-